SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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December 22 1967

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BRIEF FOR RESPONDENT

This brief answers the brief of petitioner The Hanover Shoe, Inc. dated November 24 1967 and supplements respondent's brief as petitioner in No. 463 dated November 22 1967 (consolidated herewith for argument). Review in No. 335 is limited to the treatment of income taxes in the damage calculation and the extent of retroactivity to be accorded to the Government decree underlying this private antitrust suit.

Re-Statement of Questions Presented (Rule 40)

The statement of "Questions Presented" in the Hanover brief pp. 3-4 is inaccurate by reason of assumptions

and argumentative matter therein, and should be re-stated as follows:

1. Where in a private antitrust case the existence of injury or damage depends upon a comparison of actual cost of leasing shoe machines with an estimated cost of purchasing the same machines, is not any tax saving realized by deduction from income of lease payments as business expenses a necessary element in making such comparison?

2. Whether or not it should have accorded any retroactivity at all to Judge Wyzanski's decree of 1953, was not the Court of Appeals at least correct in holding that this Court's decision in the *American Tobacco* case on June 10 1946, 328 US 781, enunciated a change in the law of monopolization and that imposition of the penalty of treble damages retroactive to any earlier date would be unjust?

Re-Statement of the Case (Rule 40)

Even as limited for purposes of the two questions presented by the Hanover petition for certiorari, its "Statement of the Case" at brief pp. 4-7 requires correction as follows:

(i) In the process of determining whether the purchase of shoe machines would have cost Hanover more money than leasing actually did, the District Court eliminated from the calculation Hanover's actual tax benefits from the lease payments in the form of business expense deductions. This factor is omitted from Hanover's Statement of the Case. At the same time the District Court rejected Hanover's claim that the leasing charges were excessive because the Government decree, "on which Hanover relied, had made no finding

that United's leasing charges were excessive", and Hanover did not appeal from this holding of the District Court (377 F. 2d at 780, A. 189).

(ii) The statement at br. 6 with respect to the damage period of 1939-55 that "There is no dispute as to this" is wrong. There is a sharp dispute both on the point of retroactivity (our brief in No. 463 pp. 43-52) and on the limitations defense pursuant to which this action was barred at least by 1918 (our brief in No. 463 pp. 66-71). What Hanover means is that tolling for purposes of the Pennsylvania six-year statute would carry that statute back to July 1 1939.

(iii) The statement at br. 6 about the Court of Appeals' alleged decision "to reduce the amount of the damages by the amount of the reduction in taxes . . ." embodies Hanover's chronic fallacy. Rather, the Court of Appeals was concerned with "damages resulting from the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance" (377 F. 2d at 792, A. 214). Hanover cannot justly say that the deduction for income taxes reduces its "damages", because (as shown below pp. 5-12) no damage exists until the income tax as well as all other consequences of the lease form of payment have been ascertained and compared with the consequences of purchase.

(iv) Hanover's implication at br. 6 that the Court of Appeals vacated the District Court's judgment only as to damages is inaccurate; Hanover also asks at br. 41 that the Court of Appeals be reversed for having vacated the District Court's award of counsel fees. Since Hanover omits in its Statement of the Case any reference to the counsel fee award (to which no reference was made in

Hanover's petition), a brief treatment of the facts follows. The District Court awarded (at United's expense) $650,000 counsel fees—$600,000 to Hanover's New York counsel, equivalent to $74 per hour of partners' time and $37 per hour of associates' time, and $50,000 to Pennsylvania counsel, at $50 per hour for the one partner involved (245 F. Supp. at 305, A. 171-72).[1] United criticized the amount as excessive, and the Court of Appeals vacated the award and remanded to the District Court for recomputation in light of the shortened damage period, noting that the award had been based in part on a "percentage of the recovery" (377 F. 2d at 793, A. 217).

(v) Hanover has raised still a further issue in its request for relief (br. 42) to which no reference is made either in its Statement of the Case or in its petition. The District Court excluded from the damage calculation United's Goodyear Outsole Rapid Lockstitch machine ("ORL") on the ground that such machines could have been substituted for by comparable machines of non-United manufacture. Because it had shortened the damage period from 1939-55 to 1946-55, the Court of Appeals deemed it premature to "pass on the sufficiency of the present record to justify the conclusion" that the Landis Stitcher was a satisfactory substitute and hence that the ORL machine should be excluded from the damage calculation (377 F. 2d at 793, A. 216). Accordingly, that court remanded the issue to the District Court for the taking of further evidence which would permit the allocation to the shortened damage period of the amount of damages involved in the ORL issue.

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[1]Hanover had contracted with its New York counsel to pay them 20% of any recovery, with a minimum of $25 per hour (245 F. Supp. at 304-05 and n. 19, A. 170-71).

1. AS TO THE TAX ADVANTAGES OF LEASING (Hanover br. 11-24).

While its claim of damage "is the excess of leasing costs over what it would have cost to own the same machines" (as phrased by the District Court, 245 F. Supp. at 287, A. 81), Hanover nevertheless makes the surprising argument that the tax advantages of leasing should be ignored in the comparison. This argument conflicts not only with the asserted basis for United's liability but also with business reality.

The asserted basis for United's liability is, in the words of the Court of Appeals, "that Hanover would have chosen to buy rather than lease the machinery". The business reality is that "in making such a determination a business of any size necessarily must give consideration to the tax elements inherent in the two alternatives from which the choice must be made" and that "the excess of one over the other of the two alternatives of purchase or lease should not be artificially inflated by ignoring the impact of taxation", 377 F. 2d 792, A. 214.

This business reality was recognized by Hanover's investment banker, Robert R. Spence (A. 587):

> "Q. What other factors must be considered [in choosing between leasing and purchasing]? A. Well, as we said, return—in other words, the arithmetic of it—if we have a piece of equipment that costs X number of dollars and we can rent it for a certain term at a certain figure, or we can put the capital in and buy it—now, which is going to be more favorable to us? In other words, can we buy this and earn enough on it so that we are better than if we rented it and paid all these rentals on it?
>
> Q. I am just trying to get you to tell us what you take into account in the arithmetic, and let me

ask you some leading questions. Would you take into account depreciation? A. Yes, sir.

Q. Taxes? A. As a refinement, yes.

Q. Refinement? Isn't that a prime element, the taxes? A. Yes."

Hanover's economic expert witness Richard M. Cyert did not deny the relevance of taxes but simply stated that he had "not investigated" the damage calculations "with respect to those issues" (A. 575-76).

It is universally recognized by management experts and businessmen that in deciding whether to lease or purchase equipment a business must take into account the tax advantages and disadvantages of each alternative. See e.g. Anthony, *Shoe Machinery: Buy or Lease?,* at 34-36 (Rev. ed. 1955); Bower, Herringer & Williamson, *Lease Evaluation,* 41 Accounting Rev. 257 (1966); Gant, *Illusion in Lease Financing,* Harv. Bus. Rev. March-April 1959 at 121, 126-27; Vancil, *Lease or Borrow—New Method of Analysis,* Harv. Bus. Rev. Sept.-Oct. 1961 at 122, 127. For example, an annual before-tax leasing cost of $160 is meaningless in relation to a before-tax purchase cost of $100 for the same item if the tax impact reduces the actual leasing cost to $80 and the purchase cost to $90. Ignoring the tax consequences in this example would make it appear that the lessee had lost $60 by leasing instead of purchasing, when in fact he had saved $10. Thus the lessee in this example would in no sense be "injured in his business or property" as contemplated by Clayton Act § 4, 38 Stat. 731 (1914), 15 USC § 15; but a court which disregarded tax consequences, as Hanover urges, would award the lessee $60 trebled, or $180. In a business framework which recognizes taxes as an inevitable component of any transaction, the refusal to take them into account in Hanover's damage calculation is inexcusable, and the statement that Han-

over's "damages are reduced by the imposition of taxes on what would have been additional income" (br. 13) is nonsensical. The existence *vel non* of "damages" cannot be determined until the tax effect has been measured.

While obvious in itself, this point is clearly stated in the very context of the case at bar by Professor Anthony of the Harvard Business School in the brochure above cited. That was a study prepared by Professor Anthony at the request of the National Shoe Manufacturers Association on the basis of the background material which he developed for the negotiations[2] conducted by the Association with United Shoe Machinery Corporation on the prices for outstanding machinery pursuant to par. 9 of the decree. The study discusses the elements to be considered by shoe manufacturers in deciding whether to buy or lease their machinery, pointing out that the technique for solving this problem with respect to used machinery

> "... is essentially the same as the technique that applies to the problem of new machinery" (p. 10).

In explaining a form of worksheet suggested for the computation of lease cost vs. purchase cost, Anthony says (p. 34):

> "We next are going to figure the savings after income taxes, since these are the only savings that

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[2]These are the same negotiations as are referred to at pp. 54-55 of our brief in No. 463 quoting Def. Ex. 34, A. 653. A fuller description of Dr. Anthony's function and procedure is given in the preface to his book, reprinted as an appendix to this brief, over the signature of Samuel L. Slosberg, President of the National Shoe Manufacturers Association. Also in the appendix is the membership of the Technical Committee of the NSMA containing the names of *two Hanover executives*. As indicated in Mr. Slosberg's preface it was the Technical Committee (including Hanover's president) who asked Dr. Anthony to make the study and who received his recommendations not only as to the place of taxes in the purchase-lease equation but also as to the significance of cost of capital.

you can pay bills with. In order to estimate the *additional income tax that will be paid if the machine is purchased,* we first need to reduce the annual cash savings (Item 23) by the depreciation that will be allowed for tax purposes if the machine is purchased." (Emphasis supplied)

Judge Wyzanski himself recognized the advantage to the lessee of tax deductions, as follows:

> "Taking into consideration the present tax structure of the United States, the leasing system, as Mr. Proctor pointed out, enables the lessor to take depreciation on the machine and use it as a tax deduction, and allows the lessee of the machine to take as a deduction as a business expense the rentals he paid, which are in one sense the economic equivalent, in part, of depreciation.
>
> Thus, there arises an overall situation in the industry which is to the tax advantage of the shoe machinery owners, plus shoe machinery lessees, and thus redounds, presumably, to the ultimate benefit of wearers of shoes in a way in which the conditional sales system would not."[8]

Hanover's statement of the tax issue shows a fundamental misunderstanding of the holding of the Court of Appeals. Hanover repeatedly states that the Court of Appeals held that "Hanover's damages should be reduced" by the net tax benefits of leasing (br. 7, see also br. 3-4, 13, 20, 22). On the contrary, the Court of Appeals held that the tax consequences of leasing and purchasing must be taken into account in determining *whether Hanover was*

[8]P. 12367 of the transcript in the Government case, hearing of May 25 1951.

damaged at all, and if so to what extent. It is the unusual nature of the claimed injury and damages, an excess of actual lease cost over an estimated purchase cost, which necessitates consideration of all factors, including the effect of Federal and state income tax deductions Hanover received for rental and royalty payments to United, depreciation of machines owned and the capital gains on the sale of any machines it sold at more than depreciated book value.

The courts have consistently held that in comparing two alternatives whose tax consequences differ the tax consequences of both alternatives must be taken into account. Thus, for example, the prudence of the investments chosen by a trustee must be judged with reference to their tax consequences for the beneficiaries of the trust. Restatement (Second), Trusts § 227, Comment *o* (1959); 3 Scott, Trusts § 227.12 (3 ed. 1967). The high tax brackets of the beneficiaries may therefore justify the choice of tax-exempt securities by the trustee. *Commercial Trust Co.* v. *Barnard* 27 N. J. 332, 142 A. 2d 865 (1958). For another example, prospective tax advantages such as loss carryovers must be considered in fixing a monetary equivalent for the value of the stock of a dissenting stockholder. *Tri-Continental Corp.* v. *Battye* 31 Del. Ch. 523, 74 A. 2d 71 (Sup. Ct. 1950). Again, regulatory commissions must weigh the reasonableness of a utility's choice between debt and equity financing by "taking into account the tax and other pertinent considerations." *Chesapeake & Potomac Tel. Co.* 6 P. U. R. 3d 222, 239 (D. C. Pub. Utils. Comm'n 1954), quoted in *American Tel. & Tel. Co.* 9 F. C. C. 2d 30, 84, rehearing denied 9 F. C. C. 2d 960 (1967). Finally, the Second Circuit held that an employee whose employment abroad was wrongfully terminated prior to the expiration of the eighteen months of residence abroad necessary to

obtain a lower tax rate on the income earned abroad might recover damages for the loss of this tax advantage. *Beggs* v. *Dougherty Overseas, Inc.* 287 F. 2d 80 (CA 2 1961).

Authority in other areas therefore supports the conclusion of the Court of Appeals that the tax consequences of the alternatives of leasing and purchasing shoe machinery must be considered. None of the authorities cited by Hanover at pp. 16-20 of its brief involved a situation like this one, where the plaintiff claims it was injured by being denied the opportunity to choose an alternative means of dealing with the defendant, and the tax consequences of the two alternatives differ. None of them concerned a case where, in the words of the Court of Appeals, "tax consequences are so inherently a part of the choice which would be made", 377 F. 2d at 792, A. 214. Rather they are based on the proposition that injury is first inflicted and then a later event, such as taxation, is claimed to reduce the damages. In this case we are not concerned with a disassociated later event. Hence no decided case supports Hanover's contention that it should be allowed to calculate damages in this case as though the tax savings it enjoyed through leasing did not exist.[4]

The table set forth at pp. 14-15 of Hanover's brief also shows a basic misconception of the holding of the Court of Appeals. The designation of the first entry in the table, "Excess Rental Charges", is of course misleading because the trial court held the lease charges to be reasonable; a less misleading designation would have been "Difference in Before-Tax Costs of Leasing and Purchasing". The second entry in the table erroneously reflects a tax saving to Hanover through deduction on its income tax returns of the so-

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[4]Hanover argues at br. 12-13 that it did not take taxes into account in deciding whether to lease or buy United machines in 1955. This is irrelevant. The only question is whether in fact purchase was the more economical alternative.

called "Excess Rental Charges", when in fact Hanover was benefited by being able to deduct the *whole* of the lease charges.[5] Thus Hanover's argument of "double taxation", as well as its assertion that the holding of the Court of Appeals conflicts with precedent, rests on a misunderstanding of the holding below.[6]

Finally, Hanover argues at br. 20-24 that the holding of the Court of Appeals conflicts with the policy of the treble damage provisions. The short answer is that that policy is not advanced by disregarding actual cost savings so as to find damage where none exists in reality.[7]

We submit that the Court of Appeals was therefore correct in holding that the tax advantages of leasing must be taken into account in determining to what extent, if at all, Hanover was damaged by its inability to purchase United machines. When taken together with cost of capital considerations, treated in our brief in No. 463 at pp. 52-56, 61, the tax advantages of leasing made it in fact the more

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[5]The second entry would be appropriate only if United's lease charges had been found to be excessive, as Hanover originally contended. This fact distinguishes the decisions cited by Hanover, including that of Judge Goodrich cited at br. 16, since Judge Goodrich based his decision on the stipulated assumption that the rentals themselves were excessive (185 F. Supp. at 828) and the other cases also concerned excessiveness not involving a difference between lease and sale.

[6]The uniform 50% tax rate assumed in the table is also at variance with the record. The present corporate income tax rate, which would be applicable to any recovery, is 48%; the rate during the complaint period, including excess profits taxes, ranged as high as 98.7% (A. 664). Disregarding the tax advantages of leasing would accord Hanover a further windfall of the difference between the two rates.

[7]Hanover argues in the footnote at br. 22 that the determination of the tax benefit of leasing would be burdensome for trial courts. But few if any cases would involve the novel theory of damages urged here, and in any event the calculations are not difficult. Also, Hanover's assertion of discrimination (br. 23) is specious. It is of no consequence that Hanover's damage may be different from others, since damages in a tort case usually vary from plaintiff to plaintiff.

advantageous alternative for Hanover. In the words of the Court of Appeals (377 F. 2d at 792, A. 215):

> ". . . It would be a distortion of reality to permit Hanover to recover damages on the ground that it would have bought machinery if it had been allowed to do so, without requiring it to give credit in its calculation of its damages for the savings which accrued to it from the tax advantages it received under the leasing system it now disowns and without also requiring it to reflect in its costs of ownership the taxes which such dominion would have imposed."

2. AS TO RETROACTIVE APPLICATION OF THE GOVERNMENT DECREE (Hanover br. 24-41).

We have argued in No. 463 that Judge Wyzanski's decree (the cornerstone of Hanover's claim to recovery), even if interpreted to condemn United's lease-only practice, should not be given retroactive application (brief dated November 22 1967 pp. 43-52). The Court of Appeals accepted this argument in part. It held, as had Judge Wyzanski in the underlying Government case, that this Court's decisions in 1913, 1918, and 1922 had permitted United to continue its lease-only policy, and that it could not be foreseen that United could be held to have monopolized before this Court's approval in the *American Tobacco* case (1946) of Judge Learned Hand's decision in *Alcoa* (1945). The Court of Appeals therefore held that it would be unjust to impose damages upon United retrospectively for the period before *American Tobacco*, 377 F. 2d at 787-90, A. 203-09. We submit that this holding is manifestly correct so far as it goes, and indeed that the principle embodied in the holding should govern the entire damage

period claimed by Hanover, on the ground that the decision in *Alcoa*, while itself a sharp break with earlier law, did not give United fair warning that the approved leasing system was a monopolizing practice.

A. Hanover's position in this Court is contradictory of the basis of recovery below.

Hanover does not directly contend for retroactivity. It does not defend the decision of the District Court that, assuming *Alcoa* to have represented a change in the law effective in 1945, this decision must still be given retroactive application for Hanover's purposes (245 F. Supp. at 272, A. 48-49). *If* there was a change in the law, as Judge Sheridan assumed and as Judges Wyzanski and Freedman held to have occurred, Hanover does not argue for retroactive application of the changed rule. Instead Hanover flatly contends that there was no change in the law; that the assumption of Sheridan J. and the holding of Wyzanski and Freedman JJ. were wrong; and that the antitrust law, changeless as the law of the Medes and Persians, had always condemned United's leasing practices.

B. Until this Court endorsed the holding of Alcoa in American Tobacco, a single firm was held to monopolize only if it abused its power by predatory or unlawful conduct, of which Judge Wyzanski emphatically absolved United.

After a careful review of the history of Sherman Act § 2,[8] Judge Wyzanski concluded in his opinion in the Government suit that until *Alcoa* predatory conduct was an indispensable element of monopolization:

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[8]Both the Government and United, at Judge Wyzanski's request, submitted memoranda on the history of Sherman Act § 2. See Brief for the United States on Liability, pp. 1-26; Discussion of the History of the Sherman Act Submitted by the United Shoe Machinery Corporation.

> "Early Supreme Court decisions went in different directions, until Mr. Justice White announced 'the "rule of reason" ' in 1911 in Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502, 531, 55 L. Ed. 619, and United States v. American Tobacco Co., 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663. *His opinions encouraged the view that there was no monopolization unless defendant had resorted to predatory practices.* And this was unquestionably the view to which Mr. Justice McKenna led the Court in United States v. United Shoe Machinery Company of N. J., 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968 and United States v. United States Steel Corp., 251 U. S. 417, 40 S. Ct. 293, 64 L. Ed. 343. But a *reversal of trend* was effectuated through the landmark opinion of Judge Learned Hand in United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416." 110 F. Supp. at 341 (Emphasis supplied)

Judge Wyzanski added that the record showed

> "... that United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." *Id.* at 345

It follows, as Judge Wyzanski stated in rejecting the more drastic of the Government's proposed remedies, that—

> "Until Alcoa lost its case in 1945, there was *no significant reason to suppose* that United's conduct violated § 2 of the Sherman Act." *Id.* at 348 (Emphasis supplied)

The Court of Appeals in the case at bar agreed with this conclusion and therefore held that treble damages should

not be imposed upon United for the period prior to this Court's approval of certain language from *Alcoa* in *American Tobacco* (see 377 F. 2d at 788-89, A. 204-06).

Hanover contends, however, that *Alcoa* represented "no new rule of law" and that even before *Alcoa* non-predatory conduct by a single dominant firm constituted monopolization (br. 28-30). This contention is based on a studied ignoring of the decisions cited by Judge Wyzanski, which show that until *American Tobacco* this Court held that a single firm monopolizes only by predatory or unlawful conduct. Thus Judge Wyzanski cited *United States* v. *United States Steel Corp.* 251 US 417, 451, where this Court had stated that

> ". . . the law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible."

Mr. Justice Day, although dissenting, agreed that monopolization required unlawful conduct:

> "[A defendant] is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it." *Id.* at 460-61.

In *United States* v. *International Harvester Co.* 274 US 693, 707-08, this Court observed that the defendant had not sold below cost to drive out competitors or attempted to set industry prices, and held that absent such predatory conduct it had not monopolized:

> "The law, however, does not make the mere size of a corporation, however impressive, or the existence of

> unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States* v. *Steel Corporation,* 251 U. S. 417, 451. And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. *United States* v. *Steel Corporation, supra,* 448." *Id.* at 708-09.

The *Steel* and *Harvester* cases were cited and followed in a passage from *United States* v. *Swift & Co.* 286 US 106, 116, only the last sentence of which Hanover chooses to quote at br. 30:

> "The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated.
>
> Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals. Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monoply (*United States* v. *United States Steel Corp.,* 251 U. S. 417; *United States* v. *International Harvester Co.,* 274 U. S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

Hanover implies (br. 30) that the term "abuse" in the last sentence quoted can be applied to United's lease clauses, which Judge Wyzanski found were "honestly industrial", 110 F. Supp. at 344, and non-predatory, *id.* at 345, although exclusionary. The full passage quoted makes it clear what "abuse" this Court was referring to: destructive price-slashing for the purpose of eliminating competitors. The requirement of predatory conduct for monopolization, far from being weakened as Hanover suggests, was reaffirmed by this Court's emphasis in *Swift* upon the assertedly predatory acts of the defendants.

Lower Federal courts uniformly held until *Alcoa* that unlawful or predatory acts were an essential element of monopolization by a single firm. E.g. *United States* v. *American Can Co.* 230 Fed. 859, 902, 234 Fed. 1019 (D. Md. 1916), appeal dismissed on motion of United States 256 US 706 ("attempt to restrain trade or monopolize industry"); *United States* v. *Keystone Watch Case Co.* 218 Fed. 502, 518 (ED Pa. 1915), appeal dismissed on motion of United States 257 US 664 ("fraudulent or unfair or oppressive rivalry"). This was also the view of commentators before *Alcoa.*[9] Professor Mason wrote in *Monopoly in Law and Economics,* 47 Yale L. J. 34, 43 (1937):

> "The size of the combination or its share of the total output of a product became important only when accompanied by predatory practices affecting the freedom of others to compete."

Commentators upon *Alcoa* likewise recognized that it broke sharply with the previous requirement of predatory

[9]E.g., Harbeson, *The Present Status of the Sherman Act,* 39 Mich. L. Rev. 189, 203-04 (1940); Jackson & Dumbauld, *Monopolies and the Courts,* 86 U. Pa. L. Rev. 231, 247 n. 64 (1938); Mason, *Monopoly in Law and Economics,* 47 Yale L. J. 34, 43, 45 (1937).

or blameworthy conduct. Professor Eugene V. Rostow hailed *Alcoa* as the embodiment of a "New Sherman Act". Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. Chi. L. Rev. 567, 577 (1947). Other commentators recognized its innovative character.[10] Professor Levi, subsequently Dean of the University of Chicago Law School and now President of that University, concluded in *The Antitrust Laws and Monopoly,* 14 U. Chi. L. Rev. 153, 160, 174 (1947) (footnote omitted):

> "The abuse theory which the *Steel* and *Harvester* cases fashioned onto the act was really the notion that only alarming and ungentlemanly conduct—involving, for example, the use of slander concerning one's competitors, an insistence upon continued growth through price wars and resulting acquisitions, and in general the fist with the glove held in the other hand for the court to see—would be sufficient to invoke the Sherman Act against the crime of monopolizing.
>
> * * *
>
> The gap between the restraint of trade cases and the close combination or monopoly cases, however, has been considerably narrowed. This was done in the *Alcoa* case."

Similarly Professor Rostow said in *The New Sherman Act: A Positive Instrument of Progress,* 14 U. Chi. L. Rev. 567, 577 (1947) (footnotes omitted):

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[10]Hale, *Size and Shape: The Individual Enterprise as a Monopoly,* 1950 U. Ill. L. F. 515, 519-20; Harbeson, *A New Phase of the Antitrust Law,* 45 Mich. L. Rev. 977, 978-80 (1947); Levi, *The Antitrust Laws and Monopoly,* 14 U. Chi. L. Rev. 153, 159-60, 174 (1947); 45 Colum. L. Rev. 655 (1945); 54 Yale L. J. 860, 862 (1945). See to the same effect, e.g., Hale & Hale, *Market Power: Size and Shape Under the Sherman Act* § 2.7 (1958); Stocking & Watkins, *Monopoly and Free Enterprise* 288 (1951).

> "Two recent cases, against the background of the last ten years of the Sherman Act in the Supreme Court, mark the new birth of Section 2. The seeds of the doctrine appear in Judge Learned Hand's remarkable opinion in the *Aluminum* case; *American Tobacco Co.* v. *United States,* which explicitly approves and supports Judge Hand's opinion, in some respects carried it into new grounds."[1]

This Court's action since *Alcoa* also shows the revolutionary character of that decision. Two weeks after the decision in *Alcoa,* this Court granted certiorari in *American Tobacco Co.* v. *United States* 324 US 836 limited to the question "whether actual exclusion of competitors is necessary to the crime of monopolization", a question which the opinion in *Alcoa* had flatly answered "No". In its opinion in *American Tobacco,* which was a conspiracy and not a single-firm monopolization case, the Court went out of its way to state that it "welcome[d] this opportunity to endorse" certain language of *Alcoa* regarding single-firm monopolization. 328 US at 813. In the first post-*Alcoa* single-firm monopolization case to come before this Court, *United States* v. *Griffith* 334 US 100, 106-07, after stating that "those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1" (i.e. of unlawful conduct), this Court explained that the combination of monopoly power with the intent to exercise it was also monopolization. In this portion of its discussion the Court cited only *Alcoa* and subsequent cases. The Court's more recent monopolization cases also cite only *Alcoa* and later cases for the proposition that non-predatory conduct by a single firm may constitute monopolization. E.g., *United States* v. *Paramount Pictures, Inc.* 334 US 131, 173; *United States* v. *E. I. du Pont de Nemours & Co.* 351 US 377, 425-26 (Warren C. J. dissenting).

Thus the uniform current of decision and the writings of commentators establish that predatory conduct was an essential requisite of single-firm monoplization until *Alcoa* and *American Tobacco*. Since concededly United has been guilty of no predatory conduct, the conclusion of Judge Wyzanski and the Court of Appeals that it could not be foreseen before *Alcoa* and *American Tobacco* that United's position was open to any question is plainly correct.

Even after *Alcoa* and *American Tobacco* United could not know that its leasing policy would be held a violation of Sherman Act § 2, as we have more fully argued in No. 463 (brief dated November 22 1967 pp. 46-48). This is so not only because of the special facts in those cases but because of United's apparently assured record of judicial approval. The holdings of this Court with respect to United's position are summarized at pp. 43-46 of our brief in No. 463, and Hanover's brief in referring to them (pp. 33-38) omits any reference to the direct holding that "the evidence disproves" coercion of shoe-makers and machinery makers by the United leases (247 US at 63).

The decisions of this Court as to United's position rested on an exhaustive examination of the United leases by the district courts. The three-judge statutory court convened in Massachusetts in 1915 went into the subject fully. Judge Putnam said, 222 Fed. 349, 361:

> "What we have submitted about the leasing system, and the propositions of the respondents which we have cited, and which cover so large a field, constitute an organization so successful in its operations, continuing so long a time, and so harmonious in its major parts, that anything which would bar out provisions in the leases and licenses necessary to the maintenance thereof must be admitted to be injurious to the manufacturers of shoes,

as well as to the manufacturers of machinery, with regard to what each justly desires to accomplish."

Judge Dodge said, *id.* at 370-71:

> "If there is any sense in which the result attained as above can be called a 'monopoly,' it does not follow, in view of the circumstances shown, that the defendants have either restrained trade or been guilty of monopolizing or attempting to monopolize within the meaning of the act. Nor can I regard the case as one in which any presumption arises, from the fact that so large a proportion of the users of these machines use the defendants', that the defendants have committed any of the above forbidden acts in accomplishing the above result. The proof is too complete that it has been in fact reached by the use of methods entirely lawful, the leading features whereof are below indicated."

and again, p. 391:

> "Not only would it have been unreasonable, as has been said, to expect the defendants to substitute a wholly different system from the leasing system which they found in use, but the evidence affords no reason to believe that anything of the kind was desired by manufacturers in general. The advantages to them of not having to tie up capital in patented machines, and of paying for the privilege of their use only according to the amount of use, were advantages which they cannot be supposed desirous of surrendering.
>
> Modifications in the contracts offered them tending, as these are shown to have done, to enable the company, through provisions adapted to increase

> the number of shoes worked on by each machine, to lessen the royalty charged per pair, and to diminish or dispense with the initial payment before required, were so obviously prompted by the purpose of developing the company's business through the perfectly legitimate method of offering them on terms more advantageous to users, that it would be unjust to treat them, on evidence no stronger than that here presented, as really intended to accomplish an arbitrary exclusion of users from any dealings with others."

Likewise Judge Brown concluded, *id.* at 401:

> "While in the early stages of the case there were some criticisms of any leasing system as opposed to a system of selling, the very great advantages to shoe manufacturers in general of being provided with machine equipment of the highest efficiency, and of being relieved of individual effort in that most costly and difficult part of manufacturing, and the general satisfaction with the system were so overwhelmingly proved, that all doubt that the leasing system in general is unimpeachable has been removed."

This decision, which was affirmed in 247 US 32 (1918), approved the full-capacity clause of the standard United lease, a clause which Judge Wyzanski found to be a deterrent to competition in 1953 (110 F. Supp. at 340). Yet in the interval another district court in the Clayton Act case had again approved this clause. Judge Trieber held in 234 Fed. 127, 151:

> "The court is unable to see anything unreasonable in these provisions [i.e. the full-capacity clause and the excess machinery clause]. The only compensa-

> tion for the use of the machines provided in the leases is the royalty upon the shoes manufactured on them. To permit the lessees to retain more machines than are necessary for the manufacture of his product would result in the lessors receiving no compensation therefor, consequently no return on the investment. As these provisions are only to be enforced, if the machines are not used to their capacity for the period of 12 consecutive months, the court is unable to say that they are in violation of any provisions of the Clayton Act, *or can in any way tend to substantially lessen competition or create a monopoly.*" (Emphasis supplied)

This holding was confirmed upon the trial in 1920 (264 Fed. 138, 167, aff'd 258 US 451). The full-capacity clause did not come before this Court at the time only because the Government abandoned its own appeal. 254 US 666.

Hence United until 1953 was doubly assured of its compliance with the law: *first* by the fact that the test theretofore existing for monopolization did not make market predominance unlawful in the absence of aggressively anticompetitive conduct; and *second* by repeated rulings of the lower Federal courts and of this Court in its favor with respect to current leasing practices. The view entertained in this Court about United's position was stated by Mr. Justice Brandeis with the concurrence of Holmes and McKenna JJ. in the *American Column & Lumber Co.* case, 257 US 377, 419:

> ". . . in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, the court held that it was not unlawful to vest in a single corporation control of practically the whole shoe machinery industry."

Nothing in the authorities cited by Hanover warrants ignoring this well-settled current of decision which legiti-

mized United's business policies until Judge Wyzanski for the first time in 1953 held them a violation in specified aspects (our brief in No. 463 pp. 27-29). Hanover's contention at br. 30 that United's exclusionary lease-only policy was the "abuse" envisaged by this Court in *United States* v. *Swift & Co.* 286 US 106, 116, is a mere play on words as we have demonstrated (pp. 16-17 above). The attempted analogy of *Straus* v. *Victor Talking Mach. Co.*, wherein a marketing plan held illegal in 243 US 490 was accepted as the basis for a treble damage award in 297 Fed. 791 (CA 2 1924) (br. 39-40), is specious. *Bauer & Cie* v. *O'Donnell* 229 US 1, on which plaintiff Victor purported to rely, did not approve the program for control by the patentee of resale prices of the article patented (229 US at 17), although Hanover wrongly implies that it did (br. 40).

In arguing that the *American Tobacco* case did not announce a new rule of antitrust law, Hanover cites five cases outside the area of monopolization by a single firm (br. 28-29). These involved combinations of competitors (the *Union Pacific, International Harvester, Reading* and *Southern Pacific* cases) and, in one instance, a conspiracy among competitors to monopolize (the *Patten* case). From these precedents Hanover argues that even before *Alcoa* a *single firm* whose monopoly power was lawful could be held to have monopolized in the absence of predatory conduct. Hanover implies (br. 29) that Judge Hand regarded these cases as precedent for his holding in *Alcoa*. On the contrary, Judge Hand relied upon these cases only for the proposition that "to have combined ninety per cent of the producers of ingot would have been to 'monopolize' the ingot market", from which he then reasoned by analogy. 148 F. 2d at 429. His opinion thus shows that he recognized that the prior standard distinguished between combinations or conspira-

cies, where the intent to monopolize was evident from the very fact that predominant power had been obtained by a combination or conspiracy, and the acquisition or retention of a monopoly position by a single firm, which was condemned only if accompanied by predatory practices. *American Tobacco Co.* v. *United States* 147 F. 2d 93, 110-11 (CA 6 1944), aff'd 328 US 781.

C. The 1918 case in which this Court upheld United's lease-only policy did not lose its validity by the expiration of United's basic patents or by the passage of the Clayton Act.

We have shown at pp. 43-46 of our brief in No. 463 that this Court in *United States* v. *United Shoe Mach. Co.* 247 US 32, 56-67 (1918), upheld United's lease-only policy. Hanover urges on two different grounds that this Court's approval of United's lease-only policy had lost its validity by 1939.

The first of these asserted grounds is that the decision was based upon the fact that United's machines were protected by patents, so that this Court "never reached a consideration of the effect of the lease restrictions" (br. 36). On the contrary, the Court's opinion makes it clear that the basis of its decision was its holding that United's leases did not, as charged, coerce or restrain either shoe manufacturers or shoe machinery manufacturers; see 247 US at 63, 66. Moreover, the possession of patents does not excuse monopolization or other violations of the Sherman Act. E.g., *United States* v. *United States Gypsum Co.* 333 US 364, 400; *Standard Sanitary Mfg. Co.* v. *United States* 226 US 20, 49.

The second asserted ground of distinction is that the passage of the Clayton Act should have warned United that its lease-only policy violated Sherman Act § 2. No prohibition of the Clayton Act was even arguably transgressed

by the lease-only policy, and the Government suit did not charge any violation of the Clayton Act; see 110 F. Supp. at 298.[11]

Judge Wyzanski was therefore clearly right in concluding, in a passage quoted with approval by the Court of Appeals in the instant case, 377 F.2d at 788, A. 205, that the 1918 case had "not yet lost all authority", 110 F. Supp. at 343. United therefore came to the Government suit justifiably relying upon this Court's holding that its lease-only policy was permissible.

3. AS TO SPECIFICATIONS OF RELIEF BY HANOVER WHICH ARE NOT PROPERLY BEFORE THE COURT (Hanover br. 41-42).

In its Conclusion Hanover raises two additional issues by way of specification of relief to which it deems itself entitled: (a) the appropriateness of the District Court's exclusion from the damage calculation of alleged damage with respect to United's ORL machine (see p. 4 above) and (b) the reasonableness of the District Court's $650,000 award of counsel fees. Neither issue is adverted to in Hanover's petition for certiorari, nor for that matter elsewhere in Hanover's brief. Accordingly, under Rules 23-1(c) and 40-1(d)(2) of this Court those issues are not properly before the Court.

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[11] Hanover's quotation from the legislative history of the Clayton Act (br. 35) suggests that its purpose in making this argument was to insert an irrelevant comment on United's lease clauses as they existed in 1914, i.e. before their modification as a result of the Clayton Act. Cf. United's change of the term of leases to meet the preferences of shoe manufacturers, 110 F. Supp. at 319. Whatever the Congressional committee thought of United's "monopoly" (a description not notably different from what Brandeis J. considered this Court had authorized, p. 23 above), surely the only significant fact is that Congress limited its attack to the tying clauses of the leases. These were removed in 1914, 258 US at 464.

We should not raise this point if the relief sought as to those two issues flowed naturally from the relief sought on the issues on which Hanover sought certiorari. As shown below, however, Hanover seeks relief inconsistent with its other requests for relief and incompatible with the decisions below—relief which would in effect (1) compel the District Court without appellate court guidance to reconsider the ORL issue notwithstanding that the District Court has fully considered and made findings on the issue in the very posture in which Hanover would have its judgment reinstated by this Court, and (2) deprive the Court of Appeals of any opportunity to decide whether the counsel fee award was reasonable.

A. ORL damage exclusion.

In view of its shortening of the damage period from 1939-55 to 1946-55 the Court of Appeals refrained from passing on "the sufficiency of the present record to justify the conclusion" that the Landis Stitcher was a satisfactory substitute and hence that the ORL machine should be excluded from the damage calculation (377 F. 2d at 793, A. 216). It remanded the issue to the District Court for the taking of further evidence which would permit the allocation to the shortened damage period of the amount of damages involved in the ORL issue since "on retrial the record may well be different from what is now before us." (*Ibid.*)

Hanover now asks in its third request for relief (br. 42) that such remand of the ORL issue for reconsideration by the District Court be affirmed, notwithstanding that in its second request on page 41 Hanover asks that the District Court's original judgment predicated upon the damage period of 1939-55 be reinstated. If the trial court's judgment were to be reinstated, clearly there would be no need for reconsideration by that court of the ORL issue, especi-

ally in the complete absence of appellate court guidance. It would simply be incumbent upon the Court of Appeals to resolve the question whether the record justified the conclusion reached by the District Court.

B. Counsel fee award.

The District Court's award of $650,000 counsel fees is $340,675 higher than what the minimum rate agreed to between Hanover and its New York counsel (see p. 4 above) would have produced. The excess reflects a contingent award calculated by the District Court as an additional charge against United instead of a contribution from the successful client's share.

Noting United's claim that the $650,000 award was "excessive", the Court of Appeals remanded the issue to the District Court for reconsideration in light of the appellate court's shortening of the damage period from 1939-55 to 1946-55 (377 F. 2d at 793, A. 217). Contrary to Hanover's suggestion in its footnote at page 41, the Court of Appeals in no sense passed on the reasonableness of the $650,000 fee award but simply deferred any such consideration until recomputation of the award by the trial court, a recomputation which presumably would materially lessen the award because the reasonableness of the award had been "tested" by the District Court "not only by the hours devoted to the case, but also by the percentage of the recovery in its original and trebled amounts." (377 F. 2d at 793, A. 217)

Hanover now contends in its footnote and in its request for relief number 2 on page 41 that this Court should bypass the Court of Appeals and affirm the $650,000 counsel fee award without permitting that court an opportunity to consider whether the award is reasonable—clearly improper relief.

C. Other damage issues.

A mandate directing the Court of Appeals to affirm the judgment of the District Court, as Hanover seeks, would also deprive the Court of Appeals of any opportunity to resolve important questions raised by United as to the validity of Hanover's damage calculations which the Court of Appeals found not "possible to adjudicate . . . on the present record" because of the retrial on damages necessitated by the shortening of the damage period; 377 F. 2d at 791, A. 212.

D. Hanover's attempt to avoid retrial.

In the absence of the dismissal or remand for certification prayed for in our brief in No. 463, a second trial of the damage issue would in any event be necessary. Hanover concedes (br. 6) that the damage period ending September 21 1955, on which the District Court founded its judgment, must be shortened to June 1 1955 as directed by the Court of Appeals, 377 F. 2d at 791, A. 211-12. Yet at br. 41 Hanover asks that "the Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965". This is clearly out of the question. Any disposition contemplating the determination of damages must provide accordingly for a retrial reflecting this point.

CONCLUSION

On each of the five grounds stated in our brief in No. 463, the judgment of the District Court dated August 13 1965 and the amended judgment of the Court of Appeals dated June 7 1967 should be vacated and the complaint dismissed. Alternatively, with respect to certification of questions to the antitrust court and computation of cost of

capital in the damage calculation, reversal and remand would be required in the absence of dismissal.

To the extent not inconsistent with the resolution of the issues in No. 463, the amended judgment of the Court of Appeals dated June 7 1967 should be affirmed and that court directed to issue its mandate accordingly to the District Court for a retrial of the issues of damages and counsel fees.

Respectfully submitted,

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December 22 1967

APPENDIX

**[Excerpts from Robert N. Anthony,
Shoe Machinery: Buy or Lease?
(Rev. ed. 1955).
See p. 7 *supra*.]**

Preface

The court decree in the United Shoe Machinery Corporation case creates a new problem for many shoe manufacturers, that of deciding whether they should lease a given item of machinery or whether they should buy it. In an effort to assist its members in devising a sound approach to the solution of this problem, the Technical Committee of the National Shoe Manufacturers Association asked Dr. Robert N. Anthony of Andrews, Anthony & McLean to study the situation and make suggestions. This book is his report.

Dr. Anthony's procedure in studies of this type is to discuss the problem firsthand with businessmen who must cope with it. He and his associates have accordingly discussed machinery problems at length with a number of shoe manufacturers. His group, and the Committee, wish to express appreciation for the fine cooperation received from the persons visited and the many helpful suggestions that resulted from these discussions. In addition, the studies made by Andrews, Anthony & McLean in connection with the recently concluded negotiations with United Shoe Machinery Corporation on used machinery sales prices have provided useful background material.

Mr. Robert C. Erb, Chairman, and other members of the Technical Committee have worked closely with Dr. Anthony throughout the study and have been of great assistance. Mr. James H. Nolan, technical advisor to NSMA, has spent much time on this project, and his con-

tributions based on years of experience in the industry have been of inestimable help. The counsel of Mr. Charles H. Jones, past president, and Mr. Merrill A. Watson, executive vice president of NSMA, has also been most helpful.

The report does not give any pat answer to the problem, but rather emphasizes that the solution depends on each manufacturer's judgment, based on his analysis of his own situation. It is not appropriate for the Technical Committee or the National Shoe Manufacturers Association to take an official position on the suggestions contained in this booklet beyond recommending that they be studied carefully. As is customary, the author accepts responsibility for the statements made.

SAMUEL L. SLOSBERG,
President, NSMA

July, 1955

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OF THE

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